STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Servitto, P.J. and *Jensen* and *Schuette*, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellant,

Supreme Court
No. 135495

-vs-

AMIR AZIZ SHAHIDEH,

Defendant/Appellee.

Court of Appeals No. 267961
Oakland County CC No. 2005-203450-FC

BRIEF ON APPEAL - APPELLANT

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STATEMENT OF QUESTION PRESENTED

I. WHETHER MCL 768.20a CONTROLS WHEN A DEFENDANT WISHES TO PURSUE AN INSANITY DEFENSE IN THE STATE OF MICHIGAN AND IF A DEFENDANT IS AFFORDED HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WHERE HE IS REQUIRED TO COMPLY WITH THAT STATUTORY FRAMEWORK?

The People contend the answer is, "yes."

Defendant will contend the answer is, "no."

The trial court answered, "yes."

A majority Court of Appeals answered, "no"; however, the dissent answered, "yes."

STATEMENT OF FACTS

Amir Aziz Shahideh, hereinafter Defendant, was charged in the Oakland County Circuit Court with first degree premeditated murder, contrary to MCL 750.316, in the death of his 20-year-old girlfriend, Leila Armin. The People's theory of the case was that Leila was planning on breaking up with Defendant, but that he could not accept her decision. The morning after she had dinner with an old boyfriend, Defendant went out and bought a t-ball bat, garbage bags, tape, cleaning products and rubber gloves to carry out his plan to murder her and clean up the scene. (46a-55a). Defendant admitted that he killed Leila but told the jury that it was an impulse killing for which he accepted responsibility within 24 hours. He offered explanations for buying the materials used in the murder and cover up. (56a-73a).

Nahid Armin, Leila's mother, testified that Leila, her youngest, was 20 years old at the time of her death. (75a). She lived with her parents in Troy and was attending school at Oakland Community College. (76a). She had been working as a nanny, was an avid tennis player and was very close to her family. (77a). Mrs. Armin and her husband were going to Chicago the weekend that Leila was murdered and Leila had planned to stay home by herself. Leila helped her mother put the suitcases into the car and, then, hugged and kissed her goodbye. (79a).

Mrs. Armin testified that on the day before she left on her trip to Chicago, Defendant came to her home in the evening because he had forgotten his wallet. (84a). During their conversation, Mrs. Armin told Defendant that Leila had changed her mind about going to Chicago and that she would be staying home. (85a). Defendant acted surprised, then he gave her a hug and a kiss and said, "I'm going to take good care of her." (85a).

Steve Agemy testified that he and Leila dated for about a year and a half during high school and that they had remained friends. (87a). He kept in touch with Leila through instant

messaging and text messaging, which they did as often as once or twice a week. (88a). They had previously communicated by cell phone, but they stopped because Defendant found out about it, and he would get angry at Leila. (89a-90a).

On June 15, 2005, Leila instant messaged Steve and asked him if he would like to get some dinner with her. (90a). Leila picked him up at his parent's house that evening, and they went to dinner at Don Pablo's in Sterling Heights. (92a). They were originally supposed to go to dinner in Birmingham, but Leila had expressed some concern about it because she did not want to run into Defendant or any of his friends. (92a-93a). Steve testified that they had a nice dinner and that Leila told Steve that she wanted to break up with Defendant, but she wanted to wait for the right time. (94a). Steve testified that Leila dropped him off at home and then went to Dave Fisher's house for a short time. (94a-95a). Steve spoke to her a couple times the next day, and she seemed fine. (96a).

On cross, Steve testified that when they were talking at dinner, Leila asked him if he thought that the two of them would ever get back together. (96a). Steve thought that she was joking but answered that "you never know what could happen." (96a). Steve reiterated that Leila said that Defendant could be annoying. (97a). He did not know Defendant personally. (97a).

David Fisher testified that he met Leila in high school and they remained very good friends, even though they never dated. (99a). David had met Defendant through Leila. (99a). On June 15, 2005, Leila came to his house at about 6:30 after having dinner with Steve Agemy. (99a). She brought David leftovers, which he ate. Thereafter, they left to pick up Chad Wilkop and then they all drove over to Blake Barczyk's apartment by Oakland University. (100a). David testified that the group was a get-together of old high school friends. (101a). Because Blake had a big screen TV, they all made plans to go back there the next day to watch the Piston's playoff

game. (101a). Leila intended on going as well. (101a). After making a stop at another friend's house that night, Leila dropped David off at home, indicating that they would be talking the following day to make plans for the game. (102a). Despite trying to get in touch with Leila several times the next day, David was unable to reach her. (103a). Leila never showed up at Blake's on the 16th. (103a).

On June 18th, the day after Leila was murdered, David received a call while he was eating dinner with his mother and grandparents that Leila was missing. (104a). The following day, he learned that Leila had been murdered on Thursday. (104a). On Friday, he had received a call from Defendant asking if he knew where Leila might be, not knowing that Defendant had actually killed Leila the night before. (104a).

On cross, David Fisher testified that when he talked to Sgt. Suzanne Post, he indicated that he found it strange that a man Defendant's age would stay in a relationship with someone without having sex regularly. (106a). He testified that Leila told him that she and Defendant were not having sex because of her physical condition. (106a). David further testified that Leila's mental health improved after she left a person by the name of John and began dating Defendant. (108a). He clarified on redirect that Leila's mental health improved when she first started dating Defendant and that John had been a bad influence on her and that she had switched high schools because of him. (108a).

Carmen Leon-Armin testified that she is married to Leila's brother Arash and that she has known Leila for about 13 years. (110a). Leila was 20 years old when she was beaten to death. Right after Carmen and her husband were married, they lived with her in-laws so she got to spend a lot of time with Leila. (111a). They joked that Leila was like her little sister and her oldest daughter. They became very good friends as adults. (110a).

On Friday June 17, 2005, Carmen and her husband were planning on taking their four children to the Detroit Tigers game. (113a). She had tried to reach Leila throughout the day, but had been unable to get in touch with her. (113a). It was not like Leila to not stay in touch, so they decided to stop by the house on the way to the game to see if she wanted to come along. (114a). When they got to the house, Carmen immediately sensed that something was not right; the alarm was not set and Leila's car was in the garage and they knew that she always set the alarm when she was home alone. (114a).

While Arash went downstairs to look for Leila, Carmen went upstairs and looked into each of the rooms, basically staying in the doorways to see if she was sleeping in any of them. (115a). When she peeked into Leila's bedroom, she noticed a blue "t-ball" bat on the floor in front of the bed, between the dresser or bookcase and the bed. (117a). She testified that the room was a mess like it always was and she thought it was odd that a bat was on the floor but she did not really pay much attention to it at the time. (117a).

After not being able to find Leila in the house and trying to reach her again on her cell phone, Arash and Carmen decided that they should call the police. (118a). While they were waiting for the police to arrive, they decided to call Defendant and his family to see if they knew where Leila might be. (119a). Defendant and his parents arrived a short time later and Defendant hugged Carmen. (119a). All of them, including Defendant, asked where Leila could be. (119a). When Defendant hugged Carmen and asked where Leila might be, Defendant did not say that he put Leila into a garbage can or that he killed her the night before. (121a). Defendant told Carmen that he had last seen Leila after dinner the night before and that he dropped her off so that she could get ready to go to a party. (119a).

Defendant helped them find people's phone numbers and gave them David's name as the person who was supposed to pick Leila up the night before to go to the party. (121a). A short time later, Officer Joseph Mairorano from the Troy Police Department came out to the house and took a report. (121a-122a). With Officer Mairorano in the kitchen, they all tried to brainstorm to figure out where Leila might be. (122a). Defendant suggested that they check in her day planner, and he left to retrieve it from her bedroom. (122a). Because there was nothing in the planner that was any help, Defendant returned it to her bedroom by himself. (123a).

At that point in time, no one had seen anything suspicious, and Officer Mairorano did not stay to search the house. Instead, he took a missing person report and left. (123a, 148a). After the officer left, Defendant indicated that he had to go into the garage to make a phone call. (124a). Carmen chastised him for leaving the door open because her two-year-old was there and had gone out the door into the driveway. (124a).

Carmen testified that Defendant was nervous looking and his mother kept saying that he looked "terrible" and "pale" and had not eaten. (124a). Carmen testified that when Defendant's family got the call that Leila was missing, Defendant's mother said that he looked like he was going to faint and that they all rushed over to Leila's house right away because they were so distraught. (124a).

After Officer Mairorano left, Carmen went upstairs to use the bathroom and then noticed that there was blood smeared in the tile and in the grout on the floor in front of the tub. In addition, the magazine rack was moved and there was blood all over the handle of the faucet. (125a). Carmen called down to her husband and asked him to come upstairs. (125a). When he did, Defendant followed and said that Leila had been bleeding from her recent surgery. (125a).

Carmen knew that it was too much blood for the size of the incision that Leila had. (125a). They then noticed a bloody foot print and Arash went immediately to the closet. (125a-126a).

Photographs depicting the scene were admitted as exhibits at trial. (126a-134a).

When Arash opened the closet door, they immediately saw a lot of blood splatter on the clothing and on the shelves in the center of the closet. There was blood on the floor and Carmen reacted by stepping back. (131a). When she stepped back, she noticed that the bat was now under the bed, so she bent over and pulled it out. She then noticed that the bat was covered in blood. (131a). At trial, Carmen identified the bat she saw under the bed. (136a).

After seeing the blood in the closet, Carmen testified that she then began to notice a lot of things in the room. (137a). She saw a Windex bottle tucked behind the bookcase (138a) and there were no sheets, duvet cover or pillow cases on Leila's bed. (139a). For some reason, Carmen then ran to the washer and dryer to see if the sheets were there, which they were not, and Defendant asked her if she had checked the hamper upstairs. (140a). When she said no, Defendant went up the stairs and Carmen followed him. When she got up there, Defendant was facing in the opposite direction from the hamper and told her that there were no sheets. (140a).

Leila's mother had previously testified that Leila's bedroom was always messy and that it would have been very unusual for her to have a bottle of Windex in her room. (80a). The Windex was usually kept in the kitchen underneath the sink. (80a). At trial, Mrs. Armin identified white cotton sheets as the sheets on Leila's bed. (81a). In addition, she testified that she was missing a beige towel along with some blue towels and some pink towels. She also identified a blanket taken from her linen closet. (82a-83a).

Carmen testified that they all went downstairs to the kitchen when Defendant's mother asked if anyone had searched any of the other rooms. (140a). Since Carmen was the one who had

already been upstairs, they decided that she should be the only one to go up and that everyone else should stay downstairs. (141a). After looking around in her mother-in-law's bedroom, Carmen came back out into the hallway to find Defendant again coming out of Leila's room. (141a). He indicated that he could not help himself. He tried to hug Carmen but she pushed him away. (141a). The two of them then went back downstairs to wait for the police. (141a). At no time during the entire search for Leila did Defendant ever tell her that he had killed Leila, that he put her into a trash can or that he moved her body. (142a-143a).

Troy Police Officer Joseph Mairorano testified that he has been a police officer for fifteen years and that he is part of the patrol response unit, handling a variety of different duties and tasks as assigned by dispatch or as found on patrol. (144a). He testified that on the evening of June 17, 2005, he was on duty when he was called to 2037 Pondway in Troy regarding a missing person. (145a). When he arrived at the address, he was met my Arash and Carmen Armin, and a report was taken. He returned a short time later and was again met by Arash and Carmen, as well as Defendant and his parents. (145a). Officer Mairorano had a chance to speak with Defendant, who was the last person to have seen Leila, and Defendant never indicated that he killed her, beat her with a baseball bat, stabbed her or put her body in a garbage can. (147a).

Officer Mairorano went into Leila's bathroom and bedroom and observed blood splatter on the white tile walls, the faucet of the tub and on her clothes in the closet. (152a). In addition, he observed a pool of blood near the front of the closet floor and it appeared as though someone had tried to clean the blood. The bedding was missing from the bed. (152a). There was a bottle of Windex off to the side. (152a).

After notifying his supervisors, Officer Mairorano then went outside to talk to all of the people who had been in the house in order to establish a timeline and a foundation for the

investigation. (154a). One of the people that he talked to was Defendant, who was outside his parent's car in the driveway. (154a). Officer Mairorano testified that someone sitting in that car would have an unobstructed view of the side of the neighbor's home next door. (155a, 168a).

Prior to speaking with Defendant, Officer Mairorano was instructed by his supervisors to have Defendant sit down and write out a timeline of the events of the night before until Leila was discovered missing. (156a). As Officer Mairorano was explaining to Defendant what he wanted him to do, Defendant indicated that he had something to say but that he did not want to say it in front of his parents. (157a). Officer Mairorano then testified:

> Amir then stated that he had to tell me something that was very important, and he kept going on. And then eventually he said I did it, I killed her. She's over there. I killed her. I wrapped her up in plastic, duct tape and she's in the garbage can over there. And then he pointed toward the direction of the house that's adjacent to the (sic) 2037 Pondway to the east. (157a).

At the same time that Defendant was telling Officer Mairorano where Leila's body was located, "officers were walking towards the corner of the house where the garbage can was where Leila's body was later found." (158a). After confessing to killing Leila and to putting her into the trash can, Defendant said to Officer Mairorano "[i]f I run away please shoot me. I feel very bad, I feel real bad." (160a). On cross examination, after refreshing his recollection with his written report, Mairorano testified that Defendant told him that he wrapped Leila's body in "bed sheets and garbage bags." (171a).

Troy Police Department Sergeant William Malik testified that he, too, was on the scene at 2037 Pondway on June 17, 2005. (173a). When he arrived, Sgt. Malik saw Defendant walking from the corner of the house next door and was approaching the sergeant as he was first walking up the driveway. (174a). Using a photograph, Sgt. Malik was able to show that Defendant was walking from the direction of the garbage can on the side of the neighbor's house. (174a). Malik

testified that it was the garbage can where Leila's body was ultimately found. (174a). Defendant never told Malik that he killed Leila, that he beat her to death or that he put her body into the garbage can. (176a).

After seeing the inside of Leila's bedroom and bathroom, Malik and Officer Morgan walked out of the attached garage and began walking toward the garbage can on the side of the neighbor's house. (177a). As they started to approach, with their flashlights on, Sergeant Schaufler called for them to stop. Sgt. Schaufler informed Sgt. Malik and Officer Morgan that Defendant had just admitted that he killed Leila and that her body was in the can. (178a).

Troy Police Department Lieutenant Keith Frye also responded to the scene on Pondway on June 17, 2005. (179a). At some point in time after he arrived, Lt. Frye was informed that Defendant had admitted killing Leila. (180a). Frye was told where the body was located. Photographs of Leila's body in the garbage can, wrapped in garbage bags, both before and after he opened the garbage bag, were shown to the jury. (181a-182a). After opening the garbage bags, Lt. Frye observed Leila, who had been bound or duct-taped at the feet. Leila's feet were at the top of the can. (183a).

After discovering Leila's body, Lt. Frye tried to coordinate with representatives from the Michigan State Police Crime Lab and the Oakland County Medical Examiner's Office. In addition, Lt. Frye contacted the on-duty prosecutor at the Prosecutor's Office. (184a). A representative from the Oakland County Medical Examiner's Office retrieved the trash can and the body and transported them both back to the ME's office. (184a). Lt. Frye also had an opportunity, after the body was removed, to look into the victim's garage, where he observed garbage cans similar to the one in which Leila's body had been found. (185a). The trash can where Leila's body was wrapped and dumped was admitted as an exhibit at trial. (183a, 185a).

Troy Police Officer Wayne Alexander Lepola was on the scene on June 17, 2005, as an evidence technician. (189a). At the crime scene, Lepola took photographs and collected evidence that appeared to have blood on it. (190a-197a). Lepola testified that he photographed the evidence, bagged it and sent it to the Michigan State Police for testing. (194a).

Troy Police Officer Larry Schehr, who is also an evidence technician, was responsible for searching Defendant's 2005 black Mazda III. (198a). The Mazda was searched after a valid consent and was taken to the evidence technician garage, which is the old sally port at the police station. (199a). Among the items found during the search of the car was a shopping bag from Hold Everything which contained a new lampshade packaged in white wrapping. (200a). In addition, Ofc. Schehr seized two Target bags, which contained a pair of green rubber gloves, a roll of duct tape and the packaging from the duct tape. (202a). There was also a hand towel or wash cloth, all of which were admitted as exhibits at trial. (203a-204a). Testing was done of the duct tape to determine if there was any evidence of the crime present. (204a-205a).

Officer Schehr also found plastic sheeting inside the Target bags in the trunk. (206a). There was also an open box of Glad Force Flex garbage bags in the trunk. (207a-208a). In addition, there was a Kroger bag in the car that had a container of Oxy Clean, a blue sponge and a Home Depot paint stick. (208a). Officer Schehr testified that Oxy Clean is a cleaning solvent. (208a).

Officer Schehr also found a white garbage bag within the car that contained bed linens. (209a). The bed linens were the same as the ones that had been identified by Leila's mother as having been on Leila's bed. (209a). Officer Schehr also found a receipt from Target, which was admitted as an exhibit at trial and which indicated that a Diet Coke, the Glad Force Flex garbage bags and the Scotch brand duct tape had been purchased on June 16, 2005 at 10:50 a.m. at the

Target store (210a-211a). Also found on the floorboard of the Mazda was a pair of jeans and a pair of gray socks. (211a). Both were collected and tagged as evidence. (212a). Officer Schehr testified that it appeared as though the jeans and socks had bloodstains on them so they were sent for analysis. (214a). Defendant's identification was also found in the car. (216a).

Lech Czerwinski testified that he and Leila had been friends from a young age and that they had played tennis together. (223a). Their parents were good friends and they had a very good brother/sister type relationship. (223a). The two had played tennis together at Wayne State University. (224a). Lech testified that on June 4, 2005, he had picked Leila up at her parent's house to take her to his birthday party. (224a). During their ride down to Detroit, Leila asked Lech how his breakup went with his girlfriend. (225a). He then asked her if she was having trouble with Defendant and she confided that "he was kind of swamping her. He, he was too jealous of a lot of things." (225a).

Leila told Lech that she was not like her family, that she did not want to get into medicine and that she potentially wanted to go out to California. (225a). She did not feel that she could do it though with Amir because he was "holding me back." (226a). Lech could not recall if those were Leila's exact words, but he did know that it was something like that. (226a). Leila told him that it seemed that any time she wanted to do something, she had to seek Amir's approval and that he was right there all the time. (226a). Lech recalled that Leila used the word "suffocated." (226a). Leila said that she wanted to get out on her own and be independent and she felt that Defendant would not support her unless he came with her. (226a). Leila said that she and Defendant had been fighting a lot and she did not like how he questioned everything she did. (227a).

On cross, Lech recalled that Leila and Defendant did take a break from each other a few months prior, but he did not know that Leila had called Defendant wanting to go to his birthday party a short time later. (228a). Lech knew Defendant and found him to be a quiet-tempered guy. (228a-229a). When Defendant was jealous, he did not get aggressive but rather "looked like a sad puppy." (229a). He also recalled that on one occasion, when Leila was sick, Defendant cared for her. (229a). On redirect, Lech testified that his conversation with Leila on June 4th took place after their break and after Leila had called Defendant to attend her birthday party. (231a). On June 4th, Leila was expressing doubt about her relationship with Defendant to Lech. (231a).

Steve Dekho testified that he had a "pretty good relationship" with Defendant for about five or six years. (232a). Steve testified that at about 5:30 p.m. on June 16, 2005, Defendant called his cell phone and asked if he could come to Steve's house to watch the Piston's game that night. (234a). Steve testified that he was planning on having people over but Defendant was not originally one of the people he intended to invite. (234a). Steve testified that he got home at about quarter to nine that night and that Defendant showed up a short time later. (235a).

Steve testified that he did not notice anything unusual about Defendant's clothing and that he did not notice any blood on Defendant's clothes. (235a). Defendant seemed to be acting completely normal and showed no signs whatsoever that he had just killed his girlfriend. (236a). Defendant appeared normal; he was not crying or shaking and even cheered when the Pistons made a good play. (237a). Defendant had a few beers that night. (238a-239a). On several occasions, Defendant appeared to call Leila, and Steve recalled hearing Defendant say "I love you, I'll call you later." (239a).

Defendant did not leave when the game was over but instead asked if he could stay over because he felt a little drunk. (240a). Steve allowed Defendant to stay and they were awake until

2 or 2:30 a.m. (241a). Steve got up the next morning at about 10 a.m. and found that Defendant was already gone. (241a). Steve recalled that about a month before the murder, Defendant had told him that he and Leila were on a break, but that they would be getting back together. (243a).

Drew Sutton testified that he was a loss prevention officer at Meijer's in Auburn Hills. (246a). Detective Suzanne Post from the Troy Police Department had asked if Sutton would be able to assist her in locating some surveillance video from the store. (247a). Mr. Sutton was able to find the tape in question, which was admitted as an exhibit at trial. (247a). The videotape, made on June 16, 2005, at a "U scan" register, depicted Defendant making a purchase at 10:15 a.m. wherein he purchased a water, ladies gloves and an aluminum bat. (248a-250a). The UPC codes on the bat matched the bat found at the scene of the murder, as did the gloves. (250a). The murder was alleged to have occurred that night at approximately 9:30 p.m.

Mr. Sutton testified that Meijer's carries duct tape and Glad Force Flex garbage bags. (251a). In addition, there is a Target store directly across the parking lot from the Meijer Store and Sutton is not familiar with the Target store in Waterford. (251a-252a). Leila's mother was shown surveillance tapes from a Meijer's and a Target store and identified Defendant as the individual making several purchases on these tapes. (83a-84a). She had known Defendant for a very long time. (84a). By stipulation, a copy of the surveillance video from the Target store was admitted as an exhibit at trial. (271a-272a).

Eric Michael Schoenbaechler testified that he is the assistant manager at Hold Everything in Somerset Mall. (253a). He was contacted by the Troy Police and asked to search his records to determine if anyone had purchased a particular lampshade from the store on June 16th or 17th. (253a). He testified that there was only one purchase of the lampshade, identified as exhibit 52 at trial, which was on June 17th at 10:58:29 a.m., the morning after the murder (255a).

Melinda Jackson, a forensic scientist with the Michigan State Police assigned to the Sterling Heights laboratory, testified that she has been a forensic scientist for 20 years. (273a). She works in the microchemistry section and is responsible for the analysis of evidence that comes into the laboratory that involves body fluids like blood, semen and saliva, and that she also does hair comparisons and footwear comparisons. (273a). After going through her credentials, Jackson was qualified as an expert in the field of serology. (274a).

Jackson testified that she was called to the scene of the murder at 2037 Pondway in Troy to assist in the collection of evidence. (275a). She went into the victim's bedroom as well as the adjacent bathroom. Using a chemical spray called leuco crystal violet (LCV), she sprayed down the area. She testified that the chemical reacts with blood if blood is present and it has a tendency to enhance bloodstains. (275a). It is a reliable test that is often used in police investigations because it will enhance residual blood left over, even if someone had attempted to clean it up. (276a). LCV works by reacting with the hemoglobin in the blood. (276a).

Jackson testified that she sprayed the floor and the tub, which made blood stains visible to the naked eye. (276a). A photograph of the LCV-enhanced crime scene was presented to the jury. (276a-277a). The scene revealed through the LCV that some of the blood had been cleaned up. (278a).

She also used a different chemical called phenolphthalein on the gloves found in Defendant's car and they too revealed the presence of blood. (278a). She then cut a sample from the gloves and sent them to the lab for further testing to determine if there was any DNA present. (279a). She found the presence of blood on the gray socks and the jeans found in Defendant's car and on the duct tape. (280a-281a). Blood was also found on the lampshade in Leila's room, the bat, the duct tape, and the Windex bottle. (283a-286a).

Heather Vitta, a forensic scientist with the Michigan State Police, was qualified as an expert in the field of DNA analysis. (256a, 259a). Vitta, who works out of the Northville laboratory in the biology and DNA unit, testified that her unit receives evidence from different agencies in the area and processes those items for the identification of blood and body fluid type evidence, or evidence that will hopefully yield a DNA result. (256a). In addition, they also provide DNA services for the Sterling Heights lab after they process it to determine if there are any positive matches. (256a-257a).

Vitta testified that she received known bloodstains from Leila Armin, Carmen Armin and Defendant. (262a). In addition, she received a swab from a bat handle, a sample from the suspect's jeans, from both the inside and outside of a glove and a roll of duct tape. (262a). Later, she also received additional reference samples from Leila Armin, which included a known bloodstain, oral swabs and vaginal swabs. (262a). She testified that, in its simplest form, she basically compares known samples with unknown samples, looking for a match. (262a).

Among her findings, Ms. Vitta found that the DNA profile obtained from Defendant's jeans matched Leila Armin, as did the blood stains found on the outside of the gloves and the duct tape. (263a). She testified that DNA testing is done by a mathematical estimate and that the estimate in this case was calculated for the Caucasian population was 1 in 1.3 quadrillion people; in African-American, it was 1 in 2.3 quadrillion; in Hispanic, it was 1 in 596.8 trillion people. (264a). Carmen Armin was excluded as a source on the jeans, the gloves and the tape. (265a).

Vitta found no results from the inside of the glove, meaning that there was no DNA found inside or that there was insufficient material. (265a). In regards to the bat handle, Vitta found a mixture of two or more people, one of them being male, and neither Defendant nor Leila could be excluded as a donor. (265a). In the case of the mixed sample on the bat, the mathematic

estimate for Caucasians was 1 in 187 people; African-American, 1 in 161 people; and Hispanic 1 in 176. (267a). The sample was consistent with a mixture of Leila and Defendant. (267a). Carmen Armin was excluded as a donor on the bat handle. (269a).

Troy Officer Michael Ersig, also an evidence technician, testified that he assisted with the investigation into Leila Armin's murder. After Defendant was arrested, Officer Ersig took a DNA sample from Defendant. (290a). In addition, Detective Post directed Officer Ersig to take a photograph of Defendant's arm, which had an injury that appeared to be a scrape or a bruise-type mark. (292a). The photograph was admitted as an exhibit at trial. (292a).

Officer Ersig testified that he was sent to a dumpster a couple miles away from Leila's house to a location near 4780 Rochester Road, which is a dental office. (289a). The building just to the north of the dental office is Defendant's father's doctor's office. (289a). Ersig first photographed, then searched the dumpster behind the dentist office. (292a-293a). After finding that some of the contents in the dumpster bore no evidentiary value, Ersig seized one garbage bag, which was admitted as an exhibit at trial. (294a). Contained within the garbage bag were three other black garbage bags, which contained a pair of underwear and a t-shirt, two towels and various other clothing. (295a-296a). The contents of the garbage bags appeared to have blood on them. (296a). The other items consisted of a shirt, two bras, a hanger, a wash cloth and two towels; those items were bloodstained as well. (297a). One of the bags contained three pairs of women's shoes, a couple magazines, a purse, other shoes, some photographs and miscellaneous magazines. (297a-298a). Everything contained within these bags was bloodstained. (298a). In one of the photographs admitted at trial, the clothing was seen hanging up because, Ersig testified, they were blood soaked and they needed to dry because they were still wet. (299a).

Sergeant Karen Dutcher testified that she works for the Michigan State Police as a latent print examiner. (303a). Her primary duties are to compare known impressions with unknown latent prints, and to process evidence for latent prints. (303a). After going through her credentials, Sgt. Dutcher was qualified as an expert in the field of fingerprint analysis. (304a).

Sgt. Dutcher testified that among the items that she attempted to obtain prints from were the aluminum bat, a Windex bottle, and a roll of duct tape. (305a-306a). She testified that it is difficult to get prints off of some surfaces and that it was not surprising to her that she did not find any prints on the items that she tested. (308a). She further testified that, just because no prints are found, does not mean that someone did not touch the item. (309a). In addition, Sgt. Dutcher testified that prints would not be left if someone was wearing rubber gloves. (310a).

Oakland County Chief Medical Examiner Dr. Ljubisa Jovan Dragovic, was qualified as an expert in the field of forensic pathology. (315a). Dr. Dragovic testified that on June 17, 2005, he performed an autopsy on Leila Armin. (319a). After gathering information from his investigators, the police and anybody else who had information, they photographed the body and continued to photograph as the step-by-step examination was done. (319a). Leila's clothing was documented and photographed and then removed. (319a-320a). An external examination was done where everything was photographed and documented. (320a). An internal examination was then done, with the examiner using a correlation with the garments found on the body to determine if the injuries remain consistent. (320a).

When Leila's body was received, it arrived in a gray plastic garbage can and was wrapped in two black garbage bags, one covering the upper part of her body and the other covering the lower part. (320a). The body was further wrapped in a purple blanket with the legs bent at the knees and tightly bound over the hips and thigh areas, and duct taped around the

ankles. (321a). A photograph of what Leila's body looked like after it was removed from the trash can was admitted as an exhibit at trial. (321a-322a). It appeared to Dr. Dragovic that the duct tape was wrapped around several times. (324a). At the time of her death, Leila was wearing a tank top saturated in blood, faded denim blue jeans, also soaked in blood, a patent leather belt, a black bra with transparent straps and pink panties. She was not wearing shoes or socks. (325a).

Dr. Dragovic testified that Leila's body had two types of injuries; multiple blunt force injuries and sharp force injuries. The blunt force injuries were all over her head and face area, including the ears, with multiple tears of the scalp with fragmentations of the underlying skull and facial bones. In addition, there were also at least 10 blunt force injuries to Leila's left forearm, left leg, right leg, hands and right forearm. (326a).

Dr. Dragovic testified that he observed at least five tears to the victim's scalp as well as at least five different bruises on the scalp, so at least 10 impacts of blunt force to the head and face of the deceased. (331a-332a). There was swelling and bruising of her right eye socket with a fracture of the bony ridge of the outer aspect to the right eyebrow. The upper part of her right orbital area was fractured and there was bruising and a fracture of her nasal skeleton and her nasal bridge was bruised. (335a). Dr. Dragovic testified that there was bruising on her extremities, including areas where there were overlapping bruises. (336a-338a). The doctor testified that the bruising to the extremities was consistent with defensive injuries. (339a-340a).

The sharp force injuries were two stab wounds to the chest and evidence of a superficial cut to the outer aspect of the left hand. (327a). Several of the blunt force injuries could have been from two separate blows to the same area. (329a-330a).

Dr. Dragovic testified that, in addition to the superficial wound to Leila's left wrist, the sharp force injuries consisted of two stab wounds to her chest. (345a). There was one stab wound

to the right breast area and right upper chest area, and one stab wound to the right mid-chest area. (345a). The stab wound in the right upper chest area went through the right lung, injuring all of the lobes of the lung. There was a small amount of bleeding in relation to the stab wound. (346a).

The stab wounds were consistent with a larger knife, about 5 inches long (348a) and the blunt force wounds were consistent with a bat, lead pipe or something very round and oblong. (349a). Based on the very small amount of bleeding as a result of the one stab wound and no bleeding in the other wound, Dr. Dragovic surmised that the blunt force trauma occurred first. (349a, 353a). She may have been dead or there may have been agonal circulation at the time of the stab wounds. (353a). He estimated that Leila sustained a minimum of 20 blunt force blows to her body, maybe more, including at least 10 to her head. (351a-352a).

Dr. Dragovic determined that Leila's cause of death in this case was multiple blunt and sharp force injuries sustained in an assault. (346a). Based on his training and experience, he ruled that Leila's manner of death was homicide. (346a). He made a determination that, based on the level of decomposition, mortal stiffness and other factors, Leila had been dead for about a day and a half, or about 36 hours, at the time of examination. (347a). He put her time of death "in the ballpark" of 9:30 p.m. on June 16, 2005. (348a).

At the conclusion of Dr. Dragovic's testimony, the People rested. (353a).

In his defense, Defendant called Detective Frank Natasi, one of the officers in charge of the case. Det. Natasi testified that he was familiar with the evidence in the case, including Leila's day planner. (355a). Det. Natasi read the entry for Valentine's Day, 2005 which read that she "went out with Amir to Jeremy's for dinner, also states did not work out with sad face and also I love him with a happy face." (357a). The entry on March 2nd indicated that "Amir leaves for Oregon" and on March 6th that "Amir comes home, yeah. I got – I got to go get him at 4:15 p.m."

(357a). The entry on May 16th read that "Amir and I take a break with a sad face drawn." (357a-358a). And on May 24th, Defendant's birthday, the entry reads, "party at Amir's Palmer, Parisa, I can't read the other word, Ephram, Laith, Tommy, Anthony, me and Amir." (358a).

Det. Natasi also testified about a bank slip from Bank One on Walton Road dated June 16, 2005 at 9:55 a.m. and a CVS pharmacy receipt dated June 16 at 11:55 a.m. for a purchase of nail clippers. (360a-361a). Det. Natasi also testified about a trip that Defendant and Leila took to Somerset Mall and verified that there was a receipt for earrings and a bracelet from Guess for June 16th at 5:22 p.m. (362a-363a).

There was then a stipulation entered that, if called to testify, Kimberly Mizell would testify that on June 16, 2005, she was working at the Express store at Somerset in Troy and that at 6:03 p.m., she rang up a sale for jeans and a shirt for a total purchase price of $78.44. The sale was written for Leila who paid in cash, was short some money and borrowed the balance from Defendant. She would also testify that she has a mutual friend with Leila and that she, Kimberly Mizell, spoke to Leila about it at the time of the sale. Mizell also spoke to Defendant. Defendant thought he recognized Mizell, and through their discussion, they figured out they had attended the same college. (363a-364a).

Detective/Sergeant Suzanne Post testified that she was the other officer in charge of the instant case. (367a). She testified that the Bank One where Defendant stopped on June 16 was on Opdyke and Walton and that the CVS is on Orchard Lake Road. (368a). She was not sure what Target store was closest to Defendant's house. (369a). Sgt. Post testified that it was she who directed that a photograph be taken of Defendant's arm (370a), but she was not sure who told the officer to search the dumpster. (371a). She testified that she never asked personnel at Target or Meijer's whether or not they sold nail clippers. (373a).

Detective James Mork from the Troy Police Department specializes in computer forensics and internet investigations. (375a). After going through his credentials, Det. Mork was qualified as an expert in the field of computer technology. (376a). He testified that on June 23, 2005, Sgt. Post asked him to go through the computer found at Leila's house and determine if there was anything of evidential value on the computer. (376a). He searched the entire computer and found some emails and instant messages between Leila and a friend named Mimi A. Harpur, including an email from April 6, 2005 at 11:08 a.m. (380a). In her email to Mimi, Leila wrote about being drunk, getting in trouble and about things going "really well with Amir". (381a). She also talked about "one stupid fight" that they had. (381a). Mimi responded that, among other things, she was glad that "things are better with Amir." (381a).

On cross, Det. Mork testified that the emails with Mimi were sent in April while the murder occurred in June. (382a). Det. Mork testified that in an email to another friend, Leila talked about Defendant's jealousy. (385a). He acknowledged during redirect that the email regarding Defendant's jealousy was sent on March 28, 2005 at 6:25 p.m. (385a).

Tonya Elaine Taylor testified that she is a medical assistant in the office where Defendant had a part-time job. (387a). She had known Defendant for about a month or a month and a half. (388a). She testified that they worked in a rather dangerous area and would generally walk to their cars with other employees. (389a). On June 15, 2005, she and Defendant walked together to the valet service at Harper Hospital to retrieve their cars. (390a). The valet brought Defendant his car first so he told her that he would stay until Tonya's car was brought to her. (390a). She testified that on that same day, she overheard Defendant on the phone talking to someone a few times and that she heard him say, "I love you, no, I love you more more (sic)." (391a).

Karina Khalife testified that she met Leila through their friend Parisa and she knew Defendant through her cousin. (394a). She had been good friends with Leila for about five years and with Defendant for about two. (394a). She and her boyfriend, Ephram Mass (ph), would hang out with Leila and Defendant. (395a). She believed that on average, the four of them would hang out together two to four times a week and more often when Ephram was in school. (395a).

Karina observed Defendant and Leila together on many occasions and they seemed to have a "friendly relationship, I mean a loving relationship from what I had observed." (396a). There were times when Defendant got jealous, like when Leila would talk to ex-boyfriends on the computer and he did check her phone records online. He also got jealous when she would hang out with her high school friends. (396a). When he was jealous, he did not act violently. (396a). Leila would get jealous too, in the same types of ways. (397a).

Karina testified that after Leila had surgery, Defendant took care of her and did things like putting a pillow behind her back or, if they were driving somewhere, tilting the seat back so that she did not have to sit upright. (397a). He would also get her water so that she did not have to get up. (398a). Karina testified that she never saw Defendant act aggressively. (398a).

On June 15, 2005, Karina planned to meet Leila and David after a law school function to watch the Piston's game. (399a). The plans did not materialize because on her way home from the function, she called Defendant and the plans were changed to go to Steve's house to watch the game. (400a). She testified that she got to Steve's at about 10:30 and Defendant was already there and appeared "a little tired, a little sad." (400a). He also seemed a little pale, kind of tired and sad. (401a). She testified that she had invited Defendant and Leila to her brother's birthday party that Saturday night and that they had accepted her invitation. (401a-402a).

On cross, Karina admitted that she had told Sgt. Post that Leila was doubting her relationship with Defendant. (402a). She also told her that Defendant was stubborn and that he thought he knew everything. She further told Sgt. Post that Leila felt like Defendant could not provide stability in their relationship and that Leila said that she loved him but that she thought that they would be better off as friends. (403a). Leila even told Karina that when Defendant kissed her, it felt like she was kissing a relative. (403a).

Karina also admitted that she told Sgt. Post that Defendant was 24 years old and was getting pressure from his family to get married. (403a). She was not sure if "pressured" was the correct word but that she meant that his future was rapidly approaching and that he was probably seeing their relationship move toward marriage. (403a-404a). Leila was unsure about the relationship and wanted room. (404a). Karina characterized Defendant as "a possessive-type boyfriend" and thought that he had jealousy issues. (404a).

Karina testified that David Fisher was just about the only guy that Defendant was not jealous of and Defendant had admitted to Karina that he had accessed Leila's phone records and was upset that she was still having contact with ex-boyfriends. (405a). The ex-boyfriend that he was upset about was Steve Agemy. (405a).

During the Piston's game, Karina never noticed any bruises on Defendant's arm and testified that she would have noticed if they had been there. (408a). In addition, she testified that during the game, Defendant was text messaging Leila and leaving her voice mails on her phone. (409a-410a). He told Karina that he had not been invited to the party that Leila was attending that night and that he was sad about it. (411a). Besides being sad, which Karina implied might have been because he was not invited to the party, Defendant showed no outward signs that he had killed Leila earlier that night; he was not crying or shaking, but just seemed tired. (412a).

Karina talked to Defendant the next day when he called to see if she had talked to Leila yet. (414a). Defendant even asked Karina what she was doing later that night. (414a-415a). Karina testified again that Defendant was upset because Leila was still having phone contact with Steve Agemy and Karina was aware that Leila had had dinner with Steve on the night before she was killed. (415a). She admitted that when Sgt. Post asked her what Defendant would do if he found out that Leila had gone to dinner with Steve, Karina answered that "he might have reacted just like he did", meaning that he would kill her. (416a).

Dr. Asadollah Shahideh testified that he is Defendant's father. (423a). Defendant has worked for him at his medical practice, as a computer tech, and has also occasionally worked on payroll. (425a). Defendant also had other jobs, including working for Dr. Moiin part-time in Detroit and at Market Square in West Bloomfield. (425a).

Dr. Shahideh testified that he has known the Armins since 1986 or 1987. Their families were very dear to each other and he referred to the Armins as a very nice family. He had known Leila since she was very little, perhaps four years old. (426a). Leila and Defendant grew up together and became romantic about two and a half years ago. (427a). Leila was a frequent visitor at their home and they always greeted each other with affection. (428a). Dr. Shahideh had taken pictures of Leila and Defendant at his birthday party on May 24th. (429a-430a).

On June 16, 2005, Defendant came to the medical office to say good-bye to an employee who was retiring to Florida. (431a). On that same day, Dr. Shahideh had a conversation with Defendant about going on the roof of their home to remove debris, which has a tendency to accumulate on the flat membrane roofing. (431a). He and defense counsel had taken photographs of the roof to show the jury how the debris would accumulate. (432a). The skylight inside the house had begun to leak and needed repair, so Defendant bought "duct tape and some other

stuff" to make the repairs and clean the area, which they had intended on doing on Saturday or Sunday. (434a). Dr. Shahideh disagreed that duct tape would be the proper solution, but he finally agreed with Defendant because he "didn't want to argue." (435a).

Defendant's father testified that Defendant bought the gloves and the plastic bags to collect acorns, leaves and debris, which they had to do twice a year. (436a). He testified that they always used the plastic bags because they would fill them on the roof with the dirt and debris and then would drop them onto the lawn. (437a). They needed to use gloves because it was a dirty job. (437a). Because of the murder, he did not clean the roof that weekend and, when he fixed the skylight, he did not use duct tape because he did not think it was a good idea. (437a-438a).

Dr. Shahideh testified that on the day after the murder, Defendant was at dinner with Dr. Shahidah and his wife and that Defendant was acting very upset and looked tired. (438a). After receiving a call telling them that Leila was missing, they decided to go to the Armin's home to see if they could help find her. (439a). They tried calling Leila's friends and then called the police to file a missing person report. (440a). After Arash and Carmen found something upstairs, including blood in the bedroom and the baseball bat, the police were called again. (441a). As this was going on, Dr. Shahideh saw his son laying on the driveway crying. (441a). Dr. Shahideh asked Defendant if there was anything that he should know and Defendant continued to cry. (442a). His father told him that he had to tell the truth and be accountable. (443a). From there on, Dr. Shahideh fully cooperated with the police. (445a-446a).

On cross, Defendant's father admitted that he loved his son. (446a-447a). He admitted that when he talked to the police, he never told them that Defendant was planning to use the duct tape for something other than to use it on Leila. (448a). He further admitted that he never told the police about another use for the garbage bags, but testified that no one ever asked him. (448a).

Shideh Shahideh testified that she is Defendant's sister and that she lives in Arizona. (451a). She testified that Defendant and Leila were involved romantically and that she would see Leila and her family often while growing up. (452a). Leila was like a member of the family and she felt like they were sisters. (452a). She saw Leila and Defendant together on many occasions and they would laugh and joke like two best friends and it was clear that they cared about each other. (453a). On a few occasions, she saw each of them jealous of the other, which mostly had to do with ex-girlfriends and ex-boyfriends. (453a). She never saw any physical violence between the two of them. (454a). Ms. Shideh introduced photographs of Defendant and Leila together at her wedding in Napa Valley, during a luncheon and while they were all bowling together. (454a-455a). In all of the pictures, the couple looked happy. (455a-456a).

Ms. Shideh testified that defense counsel gave her an assignment the night before which consisted of driving to all of the locations that Defendant visited on the morning of the murder. (456a). It was 4.2 miles from OCC to Bank One; about 4 miles from Bank One to Meijer's; 8 miles from Meijer's to Target; 3 miles from Target to CVS and about 2 miles from CVS to Defendant's home. (458a). She testified that the Target in Waterford was the closet to their house. (458a). Nail clippers were available for purchase at both Target and Meijer's. (458a).

Dr. Mark David Weingarten testified that he lives next door to the Shahidehs. (460a). Dr. Weingarten has seen Dr. Shahideh and Defendant go onto the roof on occasion. (460a). He did not know what they were doing, however. (460a). On cross, Dr. Weingarten testified that, in Bloomfield Hills, they have to put leaves and twigs "and whatnot" into the brown bags that you get at Home Depot or Target. (461a). When asked when he had seen Defendant and his father on the roof, the witness testified that he was not sure when the last time he saw them was but that it was "either the spring cleanup or fall cleanup that they would be up there." (461a).

The defense rested and the People called no witnesses in rebuttal. (462a).

Defendant argued a motion to reduce the charge to second degree murder. (463a-465a). Judge Andrews denied Defendant's motion. (466a-469a).

After closing arguments (470a-487a; 487a-507a; 507a-514a) and instructions, the jury retired to deliberate. One of the notes sent out by the jury prior to their verdict indicated, "was this defendant able to propose a defense of 'temporary insanity' if in fact he had made a confession, plus statement to the police department prior to defense counsel was involved (sic)?" (516a). The trial court answered, "Please base your decision on the evidence introduced during the trial and the law provided by the Court." (516a). Both counsel indicated that the court had sought their approval for each response, and that both counsel had given their approval. (517a-518a). The jury thereafter returned a verdict of guilty of homicide – murder, first degree premeditated. (519a). Defendant was sentenced pursuant to statute to life without the possibility of parole.

Defendant appealed his conviction as of right, arguing that he was denied a fair trial when the trial court would not allow him to undergo an independent psychological evaluation prior to undergoing an evaluation at the Center for Forensic Psychiatry. Oral arguments before the Michigan Court of Appeals were heard on June 5, 2007, wherein both parties agreed that MCL 768.20a governs in this case. Prior to issuing an opinion, however, the Court, on its own motion, requested that the Criminal Defense Attorneys of Michigan, the Prosecuting Attorneys Association of Michigan and any other interested persons file briefs amicus curiae to address the same three questions posed by this Court's May 2, 2008 Order Granting Leave to Appeal. (520a; 520a).

On October 25, 2007, after finding that MCL 768.20a does not apply until a defendant "plans or intends" to raise an insanity defense at trial, a majority of the Court of Appeals judges remanded the matter back to the trial court with instructions that Defendant be permitted to retain a psychologist of his choosing to ascertain Defendant's mental condition at the time of the offense. The majority found that, if Defendant could find an expert to testify that there is a triable issue concerning Defendant's sanity at the time of the charged offense, then he is entitled to a new trial. (526a)

The Honorable Bill Schuette dissented, finding that, in enacting MCL 768.20a, the Legislature created a comprehensive statutory scheme governing the use of the insanity defense in our state and that a defendant may not raise the affirmative defense if he or she refuses to comply with MCL 768.20a. (528a). In addition, Judge Schuette found that the most logical interpretation of the statute is to view it in chronological order (i.e., requiring a defendant to undergo an examination at the Center for Forensic Psychiatry before having a right to an independent examination.) (528a). Finally, Judge Schuette found that, even if the majority was correct in concluding that MCL 768.20a does not govern Defendant's request for an independent examination, Defendant's constitutional rights were still not violated when he and his counsel chose to forego an insanity defense for a different trial strategy. (529a).

The People file the instant appeal, seeking to reverse the published opinion of the Court of Appeals majority, for the reasons stated herein and in Judge Schuette's dissent. Additional pertinent facts may be discussed in the body of the argument section of this brief, *infra*, to the extent necessary to fully advise this Honorable Court as to the issues raised on appeal.

ARGUMENT

I. MCL 768.20a CONTROLS WHEN A DEFENDANT WISHES TO PURSUE AN INSANITY DEFENSE IN THE STATE OF MICHIGAN, AND REQUIRING A DEFENDANT TO COMPLY WITH THAT STATUTORY FRAMEWORK DOES NOT DENY A DEFENDANT OF HIS CONSTITUTIONAL RIGHTS.

Standard of Review:

This Court reviews the proper interpretation of a statute de novo. *People v Adams*, 262 Mich App 89, 91; 638 NW2d 729 (2004). A trial court's decision to deny a defendant's request for an independent psychiatric evaluation is reviewed for an abuse of discretion. *People v Smith*, 103 Mich App 209, 210; 303 NW2d 9 (1981); *People v Dumont*, 97 Mich App 50, 55; 294 NW2d 243 (1980).

Summary of Argument:

The Legislature set forth a comprehensive statutory scheme which was intended to govern the use of the insanity in the State of Michigan. This Court has found that MCL 768.20a is the sole standard for determining criminal responsibility as it relates to mental illness or retardation. While the People agree that Defendant has a right to present a defense and to an independent psychological evaluation of his mental condition, he cannot merely pick and choose which sections of MCL 768.20a he wants to follow. The Legislature drafted the statute to provide a fair and reasonable means by which an individual can be evaluated to determine if he was insane at the time of the commission of the offense. Defendant was not deprived of his right to pursue a particular defense or of the opportunity to have his own expert evaluate his mental condition. Rather, he was merely required to follow the statute and to proceed in the legislatively designated order.

The Court of Appeals majority was incorrect in finding that Defendant had to give up his Fifth Amendment rights against self-incrimination in order to pursue an insanity defense. The only logical interpretation of the statute is the interpretation found by the trial court and Judge Schuette. The trial court correctly found that the insanity statute is clear in its chronological order. Had the Legislature intended that a defendant bypass the first two steps in the process, then language to that effect could have been included. In addition, were the court to interpret MCL 768.20a in the manner suggested by Defendant, then it would naturally follow that the People could likewise request an independent evaluation even if the defendant chose not to pursue that avenue of defense. The only way to prevent an abuse of the process is to ensure that the statute is followed in every case, by all of the parties.

For all of the reasons stated herein and in Judge Schuette's dissenting opinion, the Court of Appeals majority was incorrect in finding that the trial court's reasonable interpretation of MCL 768.20a and its denial of Defendant's motion to secure an independent evaluation prior to an evaluation at the forensic center denied him of a fair trial. The Court of Appeals majority was legally erroneous in finding that the statements contained within the notice could be used against Defendant as impeachment evidence and in adding an additional term to the statute. In addition, the majority failed to recognize that this Court has repeatedly held that MCL 768.20a is a comprehensive statutory scheme which applies in all felony cases dealing with the issue of mental illness or retardation. Defendant was not denied the right to pursue a defense, nor the effective assistance of counsel where counsel had the ability to pursue the defense of insanity but made the strategic decision to forego the defense in favor of a mitigation defense. Defendant was not entitled to a new trial in this case and his conviction should be reinstated for all of the reasons stated herein.

Procedural History:

Prior to trial, Defendant filed a Motion for Order Permitting Access to Defendant for Purposes of Conducting Psychological Exam. (16a). Defendant contended that counsel did not possess sufficient information to determine whether to pursue an insanity defense. (17a-18a). He did, however, indicate in his reply brief that Defendant had "previously been diagnosed as suffering from, among other things, bi-polar disorder, and he has previously been prescribed Prozac, Xanex, and Ritalin." (36a). In response, the People indicated that there was sufficient information contained within his motion to refer Defendant to the Center for Forensic Psychiatry and that a referral would be made if desired by the defense. (31a). However, defense counsel made a strategic decision to not accept the stipulation and did not send Defendant to the Forensic Center. Instead, counsel wanted Defendant to be examined by a psychologist of his own choosing to conduct the same tests that would otherwise be conducted at the Forensic Center.

After the People objected to Defendant ignoring MCL 768.20a and having an expert of his own choosing conduct an evaluation prior to an evaluation by the Center for Forensic Psychiatry, Judge Steven N. Andrews issued a well-reasoned, legally sound written opinion denying Defendant's request on grounds that "the requirement that a defendant be evaluated by personnel at the center for forensic psychiatry before evaluation by independent examiners of the parties' choosing, promotes integrity, accuracy and reliability of evidence regarding insanity." (43a).

a. The plain language of MCL 768.20a sets forth seriatim the proper methodology for pursuing an insanity defense.

Construing MCL 768.20a seriatim is the only way to ensure the integrity, accuracy and credibility of evidence of insanity. This Court has previously recognized that, in Michigan, use

of the insanity defense has been governed by statute since 1975. 1975 PA 180; *People v Carpenter*, 464 Mich 223, 230; 627 NW2d 276 (2001). Legal insanity is an affirmative defense requiring proof that, as a result of mental illness or being mentally retarded as defined in the mental health code, the defendant lacked "substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or conform his or her conduct to the requirements of the law." MCL 768.21a(1). Importantly, the statute provides that "[t]he *defendant* has the burden of proving the defense of insanity by a preponderance of the evidence." MCL 768.21a(3); *Carpenter*, *supra*, at 231 (emphasis from *Carpenter.*)

MCL 768.20a governs the use of an insanity defense in felony cases. *Carpenter*, *supra*, 223. MCL 768.20a states:

> (1) If a defendant in a felony case proposes to offer in his or her defense testimony to establish his or her insanity at the time of an alleged offense, the defendant shall file and serve upon the court and the prosecuting attorney a notice in writing of his or her intention to assert the defense of insanity not less than 30 days before the date set for the trial of the case, or at such other time as the court directs.
>
> (2) Upon receipt of a notice of an intention to assert the defense of insanity, a court shall order the defendant to undergo an examination relating to his or her claim of insanity by personnel of the center for forensic psychiatry or by other qualified personnel, as applicable, for a period not to exceed 60 days from the date of the order....
>
> (3) The defendant may, at his or her own expense, secure an independent psychiatric evaluation by a clinician of his or her choice on the issue of his or her insanity at the time the alleged offense was committed. If the defendant is indigent, the court may, upon showing of good cause, order that the county pay for an independent psychiatric evaluation. The defendant shall notify the prosecuting attorney at least 5 days before the day scheduled for the independent evaluation that he or she intends to secure such an evaluation. The prosecuting attorney may similarly obtain independent psychiatric evaluation. A clinician secured by an indigent defendant is entitled to receive a reasonable fee as approved by the court.
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> * * *

A defendant may not raise the affirmative defense of insanity if he or she refuses to comply with MCL 768.20a. *People v Hayes*, 421 Mich 271, 279-280; 364 NW2d 635 (1984). As recognized by Judge Schuette in his dissent in the instant case, although a defendant has a constitutional right to present a defense, US Const Am VI; Const 1963, art 1 sec 1, that right is not absolute. *Id.*, at 279. Rather, a defendant must still comply with the "established rules of procedure and evidence designed to insure both fairness and reliability in the ascertainment of guilt and innocence." *Id.*

In its wisdom, the Legislature sought to prevent any possibility of taint, whether intentionally or unintentionally, which could arise if either the prosecution or the defense were permitted to have their expert examine a defendant before personnel from the Center for Forensic Psychiatry. It is important to remember that, just like this Court and the Court of Appeals, the Center for Forensic Psychiatry is an independent agency of the State, *not an arm of the prosecution*. A Forensic Center evaluator is not seeking to find either sanity or insanity, but rather is seeking to reach an unbiased conclusion regarding an individual's mental status. By setting forth the order as it did in MCL 768.20a, the Legislature recognized that fairness, accuracy, reliability and integrity of the evaluations would best be served by having the only truly independent body make the first evaluation.

The primary goal of judicial interpretation is to ascertain and give effect to the intent of the Legislature. *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004). The first criterion in determining intent is the specific language of the statute. *People v Lively*, 470 Mich 248, 253; 736 NW2d 561 (2004). The words provide "the most reliable evidence of its intent..." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999), quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981). In interpreting the statute,

this Court considers the plain meaning of the critical word or phrase as well as "its placement and purpose in the statutory scheme." *Sun Valley*, *supra*, at 237, quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995). MCL 768.20a lists a referral to the Forensic Center first and then allows for both parties to seek separate evaluations as they see fit.

The Court of Appeals majority did not find that the trial court applied the statute incorrectly, as was argued by Defendant in his direct appeal, but instead found that the statute did not apply at all. The majority found that, "[p]ursuant to the plain statutory language, MCL 768.20a does not come into play until a defendant *definitively* 'proposes to offer in his or her defense testimony to establish his or her insanity...'" (524a. Emphasis added). In making this finding, the majority essentially found that MCL 768.20a is meaningless unless and until a defendant's own hired expert convinces defense counsel "definitively" that an insanity defense is viable. If the Legislature intended for a defendant to first obtain his or her own expert to investigate whether an insanity defense may be available, the Legislature could have included such a mechanism within its statutory scheme. It did not. Such a mechanism should not now be judicially created.

This Court considers both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme. It is necessary to avoid a construction that renders any part of the statute surplusage or nugatory. *People v Waltonen*, 272 Mich App 678, 685; 728 NW2d 881 (2006). In addition, "[a] necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Id.*, quoting *Roberts v Mecost Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). United States Supreme Court Justice Antonin Scalia has written, "[w]ords do have a limited range of meaning, and no interpretation that goes

beyond that range is permissible." Scalia, *A Matter of Interpretation: Federal Courts and the Law*, (New Jersey: Princeton University Press (1997)) p 24. Interpreting MCL 768.20a as did the majority, in violation of the rules of statutory construction, renders both the order of the statute as well as subsection (3) nugatory, and reads in a non-existent requirement that defense counsel's subjective belief is the triggering factor to application of the statute.

The only way to ensure the integrity of the insanity defense is to have the first evaluation done by the only truly independent examiner. Although this Court has not previously been asked to address it, this issue has been addressed by the federal bench when deciding the proper interpretation of Massachusetts' insanity defense, also known as the Briggs Law.[1] In *McGarty v O'Brien*, 188 F2d 151 (CA 1, 1951), a case relied upon by the United States Supreme Court in *Ake v Oklahoma*, 470 US 68, 85; 105 S Ct 1087; 84 L Ed 2d 53 (1985) and *United States ex rel Smith v Baldi*, 344 US 561; 73 S Ct 391; 97 L Ed 2d 549 (1953), the First Circuit found that Constitutional Due Process requires the State to provide a criminal defendant with a neutral examiner, not an examiner of his own choosing. The Court wrote:

> This is not a case where the state has refused to provide an impartial psychiatric examination of the accused with a view to determining his sanity and criminal responsibility. Quite the contrary, in compliance with a mandatory provision of law, the state has, at public expense, provided such an examination by two impartial experts; and their joint report has been made available to the defense. The doctors designated by the Department of Mental Health to make the examination are not partisans of the prosecution, though their fee is paid by the state, any more than is assigned counsel for the defense beholden to the prosecution merely because he is, as here, compensated by the state. Each is given a purely professional job to do – counsel to represent the defendant to the best of his ability, the designated psychiatrists impartially to examine into and report upon the mental condition of the accused.

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[1] The insanity statute in Massachusetts was amended in 1970 and again in 1987. The insanity statute is now found at MGLA 123, sec 15. The caselaw relied upon in the instant brief, however, remains a valid interpretation of statutes then existing.

> In enacting the Briggs Law, the legislature was interested only in the impartial ascertainment of the truth as to the mental condition of the accused in its bearing on his criminal responsibility or on the way he ought to be dealt with by the agencies concerned. * * * The examination under the statute, may fairly be assumed to have been made by competent persons, free from any predisposition or bias and under every inducement to be impartial and to seek for and to ascertain the truth. [*McGarty*, *supra* at 155, citing *Commonwealth v Devereaux*, 257 Mass 391, 396; 153 NE 881, 882 (1926).]

The United States Supreme Court agreed with the rational of the First Circuit in *Ake*, *supra* at 85 ("the defendant had been examined by two psychiatrists who were not beholden to the prosecution . . . there is no constitutional right to more psychiatric assistance than the defendant in *Smith* [*v Baldi*] had received.") and *Baldi*, *supra* at 568 (". . . the issue of petitioner's sanity was heard by the trial court. Psychiatrists testified. That suffices.") They agreed with the proposition that due process requires only that a defendant receive a psychiatric examination by one neutral and detached examiner who is not beholden to either side.[2]

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[2] Numerous other states, as well as the federal government, have a statutory scheme similar to MCL 768.20a. In none of the states with a statutory scheme similar to MCL 768.20a has a court in that state interpreted their statute to require that defense counsel first "definitively" decide or "solidify a plan" to raise the defense at trial before the statute is triggered. Of those with a similar scheme, it is the court who appoints the expert to do the evaluation, which is either one or more neutral and independent evaluator(s) who have previously been approved by the court [Federal Government, 18 USCA 4242; Alaska Stat 12.47.070; Ariz Rev Stat 13-502; Ann Calif Penal Code 1027; Illinois Comp Stat 5/104-13; Indiana Stat Ann 35-36-2-2; Kansas Stat Ann 22-3219; Mass Gen Laws Ann 123 sec 15; Mississippi Code Ann 99-13-11; Missouri Stat 552.030; Montana Code Ann 46-14-202; Nebraska Rev Stat 29-2203; Texas Stat & Codes 46C.101; Virginia Code Ann 19.2-169.5; Washington Rev Code Ann 10.77.060; Wisconsin Stat Ann 971.16], an expert from the state's department of mental health [Ala. Code 15-16-22; Colo Rev Stat 16-8-106; Fla Stat Ann 916.115; Georgia Uniform Superior Court Rule 31.5; Maine Rev Stat 101-B; Maryland Code Crim Proc 3-111; New Jersey Stat Ann 2C:4-5; Utah Code Ann 77-16a-301; Vermont Stat Ann 4814] or a combination of both [Hawaii Rev Stat 704-404; Louisiana Stat Art 644; Kentucky Rev Stat 504.070].The remaining states either have no statutory scheme (and require only that a defendant prove his or her insanity by a preponderance of the evidence) or a statutory scheme so dissimilar to Michigan's that they are irrelevant for purposes of this appeal.

The First Circuit in *McGarty* went on to explain the rational behind the Briggs Law and why the Massachusetts legislature determined that the person conducting the first examination should be the one truly independent examiner:

> For the genesis of the legislation, see a statement by Dr. L. Vernon Briggs, "Conditions and Events Leading to the Passage of the Massachusetts Law Commonly Called the Briggs Law," 12 Bulletin Mass. Dept. of Mental Diseases (Oct. 1928) 2, 5. Dr. Briggs explained: "Before this law was passed the procedure employed in ascertaining the mental responsibility of persons accused of crime was almost inconceivably futile, cruel and wasteful. Hardly a day passed, and certainly never a week without the spectacle in some one of our courts of two or more physicians, possibly graduates of the same medical school, and belonging to the same scientific and medical societies, pitted against each other, testifying to diametrically opposite opinions as to the mental condition and responsibility of the person in question. As a result, psychiatric specialists were subject to ridicule in the press; juries seldom got an unbiased scientific opinion, for no sooner had one side employed an expert in mental disease than the other invariably engaged another alienist, of whom there were some to be found who could be employed to offset their rivals' testimony." After some years' experience with the operation of the law, Dr. Briggs was able to report: "The reputation for unbiased and scientific administration of this law held by the Department of Mental Diseases in Massachusetts and the realization by the courts and juries that psychiatrists when not partisans can help them makes for the continued success of the law. The virtual elimination of contending medical men in criminal trials has raised the medical profession in the opinion of the public and of the press. Instead of the common spectacle of members of the medical profession pitted against each other, we have since the law was passed in 1921 an average of less than one case a year in which psychiatrists have testified in opposition in the same criminal case. Thousands and thousands of dollars have been saved, not only to the State but to the defendants, and our mentally sick offenders, instead of being executed or punished by imprisonment and perhaps turned loose in a few years in an irresponsible condition to commit further crimes, thus becoming recidivists, are placed in hospitals where they remain, perhaps for life, unless they fully recover, and both they and the public are protected." [*McGarty*, *supra* at 155-156].

The First Circuit went on to further quote Dr. Winfred Overholser that:

> . . . the examination is made by a neutral agency which is not only not retained by either prosecution or defense but which is not even an agency of the court. The examination is made by trained psychiatrists who are free of any

> preformed assumptions of bias, and are seeking only to find the truth regardless of whose side it may favor.[3] [*McGarty*, *supra* at 156].

As noted, the benefit of following the chronological order of MCL 768.20a is to prevent any bias or presuppositions to become factors in the evaluation. It is certainly not alleged that present counsel or Defendant's retained expert would engage in misconduct or intentionally taint the outcome by telling Defendant what to say to a subsequent evaluator, but less scrupulous or less attentive practitioners could, even unwittingly, plants the seeds of malingering in a defendant's mind. Unfortunately, so-called "experts for hire" do exist and may coach someone to achieve a certain result if sufficiently compensated; the only way to prevent this type of taint, whether intentional or inadvertent, is to ensure that the only neutral, unbiased evaluator is the first to test the defendant.

b. MCL 768.20a is a comprehensive statutory scheme that applies in every case where a defense of insanity is contemplated. The fact that the defense has not yet made a final decision on whether to present the defense at trial is irrelevant to the statute's applicability.

The Court of Appeals majority found that, unless and until defense counsel makes the definitive, subjective decision to pursue an insanity defense by filing a notice of intent, then MCL 768.20a is inapplicable. The majority found that the trial court denied Defendant the ability to present a defense in this case when it determined that MCL 768.20a is applicable in all felony cases when the defense of insanity is being actively explored via consultation with mental health experts. In reading in an additional requirement [that counsel has "solidified" a plan to raise the defense at trial, 523a], the Court of Appeals majority has essentially ensured that MCL 768.20a will rarely be followed because, until defense counsel can find an expert to support his or her

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[3] Overholser, "The Practical Operation of the Massachusetts Law Providing for the Psychiatric Examination of Certain Persons Accused of Crime," 12 Bulletin Mass. Dept. of Mental Diseases (Oct., 1928) 5, 10.

argument, the plan to raise the defense will never be "solidified" (and may, according to the Court of Appeals majority, even be unethical). The Court of Appeals majority's interpretation of the statute renders parts of the statute, and arguably the statute itself, meaningless until defense counsel forms the subjective, definitive decision to pursue the defense at trial.

The People maintain that no matter how opaquely the defendant phrases it, any formal reference to the insanity defense amounts to a "proposal" and triggers MCL 768.20a. The Court of Appeals majority disagreed and found that the language in the statute was ambiguous, thus, subject to interpretation through standard dictionary definitions. (523a). Using the definition of "propose" as defined in *Random House Webster's College Dictionary* (1997) to mean "plan; intend" and *Webster's Third New International Dictionary, Unabridged Edition* (1965) to mean "to form or declare a plan or intention", the majority found that MCL 768.20a was not intended to apply in any case until a defense attorney forms the *subjective* belief to *absolutely* pursue the defense of insanity. In other words, until defense counsel can state without question that the defense is a viable one that he or she *will* pursue, the statute remains inapplicable, and the defense can explore the issue, unfettered by the controls of the statute.

In support of this interpretation, the Court of Appeals majority insinuates that counsel for a defendant could be subjecting him or herself to a grievance for filing a notice of intent if the defense later turns out to have been unsupported by the evidence. The majority stated in footnote 1:

> . . . MRPC 3.1 provides that a lawyer must not assert an issue in any proceeding "unless there is a basis for doing so that is not frivolous." An attorney would violate this ethical obligation by filing a written notice of intent to raise the insanity defense before adequately investigating the viability of such a defense and forming a sufficient basis to believe that the defense is warranted. [524a].

Nothing in the statute, however, requires that defense counsel be certain, or even confident, that a defendant was insane at the time of the offense prior to filing a notice of intent. Such a requirement would be untenable and unreasonable, particularly given the fact that, when most Forensic Center referrals are made, defense counsel has had very little contact with his or her client. An attorney who makes a referral to the Forensic Center, often with the stipulation of the prosecution, is not in violation of his or her ethical responsibilities. To the contrary, where defense counsel possesses *any* information calling into question a defendant's mental status, even the type of information possessed by defense counsel in this case, it could not reasonably be held that he or she is in violation of his or her ethical duties for pursuing every possible defense for his or her client.

Should it turn out that every expert finds that the defendant was sane at the time of the defense, then the defense can be withdrawn and defense counsel would not be asserting a frivolous defense. MRPC 3.1 further indicates that "[a] lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may so defend the proceeding as to require that every element of the case be established." Defense counsel had every right to defend and question Defendant's intent, mens rea or state of mind in this case. To argue that counsel, or any attorney in a similar situation, could face a grievance for accepting the stipulation of the assistant prosecutor, or for permitting the investigation of all possible defenses, is simply wrong and not supported by the law.

As noted, Defendant was not denied the right to be evaluated for insanity in this case. To the contrary, had Defendant sought to pursue the defense, the People would have stipulated to have Defendant sent to the Forensic Center. It was Defendant's choice to forego the defense and to pursue a defense of mitigation. Contrary to the findings of the Court of Appeals majority,

neither the trial court nor the prosecution deprived Defendant of his ability to pursue a defense; he was merely required to pursue the defense in the proper manner.

In this Court's leave grant and in the Court of Appeals' requests for briefs amicus curiae, both Courts asked the parties to brief the issue of "whether MCL 768.20a governs a request by an incarcerated defendant for an independent psychiatric evaluation to determine whether an insanity defense may be available where no notice of intention to assert an insanity defense has been filed". As noted above, the short answer to the question is "yes" because MCL 768.20a is intended to apply in all cases in which an insanity defense is even contemplated. However, it is the People's position that the correct focus of inquiry is not on the actual notice of intent, which the People view as a condition precedent to an insanity defense, or on the subjective intent of defense counsel, but rather should be on whether an insanity defense is being contemplated at all. If the defense is contemplated, then the statute applies.

As previously indicated, the Court of Appeals majority has determined that MCL 768.20a is inapplicable until defense counsel has "solidified" a plan to raise the insanity defense. However, the majority relies on flawed legal analysis and adds a requirement to the statute which was not intended by the Legislature. This Court has found that MCL 768.20a is a comprehensive statutory scheme governing the use of the insanity defense, *Carpenter*, *supra*, and a defendant may not raise the affirmative defense if he or she refuses to comply with MCL 768.20a. *Hayes*, *supra*, at 279-283.

Because neither MCL 768.20a nor this Court's interpretation of the insanity defense support the majority's opinion that the statute applies only after defense counsel has positively determined that he or she will pursue an insanity defense at trial, the Court of Appeals opinion must be reversed. If, as found by the majority, it is defense counsel's solidification of a plan to

pursue the defense that is the triggering mechanism, then subsection (3), allowing the defendant to then secure their own experts, is rendered nugatory. Furthermore, the only way to ensure the integrity of the system is to permit the only truly unbiased body -- the Center for Forensic Psychiatry -- to perform the first test. Since it is only after an expert evaluates a defendant that a plan could be solidified, and because the statute envisions the desire to have one's own expert do an evaluation, the People contend that application of MCL 768.20a in all insanity cases is the only way "to assure both fairness and reliability in the ultimate verdict." *Hayes*, *supra*, at 279.

c. Defendant was not denied his constitutional right to present a defense where defense counsel made the strategic decision to forego an insanity defense.

It was defense counsel, not the trial court, who made the decision not to pursue an insanity defense. Counsel made a reasonable and calculated decision to pursue the defense of mitigation rather than insanity where the facts adduced at trial demonstrated that Defendant was not temporarily insane when he killed Leila. Defense counsel was given the opportunity to follow the procedures as set forth in MCL 768.20a but he made a strategic decision not to pursue that avenue. Even if this Court were to find that MCL 768.20a does not apply in this case and that the trial court erred in applying it, Defendant still cannot demonstrate that there would have been any prejudice by pursuing the defense in the manner set forth by the Legislature.

In his Brief on Appeal in the Court of Appeals, Defendant argued that the trial court denied him his right to pursue the insanity defense because he was forced to choose between his Fifth Amendment right to remain silent and his Sixth Amendment right to present the defense. As pointed out by both the trial court and Judge Schuette in his dissent, this Court has repeatedly held that, following the statutory scheme as set forth in MCL 768.20a does not put a defendant to such a choice. *Toma*, *supra*, at 294. In his dissent, Judge Schuette noted:

> Indeed, our Supreme Court has recognized that limitations placed on the insanity defense under the procedures set forth in MCL 768.20a do "'not unconstitutionally infringe on a defendant's right to present a defense.'" *People v Toma*, 462 Mich 281, 294; 613 NW2d 694 (2000), quoting *Hayes*, *supra*, at 283. Therefore, our Supreme Court has held that it is appropriate to preclude evidence of insanity when a defendant fails to follow the procedures set forth in MCL 768.20a. *Hayes*, *supra*, at 283 (noting that it is "an appropriate means of protecting integrity, accuracy, and credibility of evidence of insanity.") [528a].

In denying Defendant's request for an independent psychological examination prior to an examination at the Forensic Center, the trial court found that Defendant was not being placed "in the impossible position of relinquishing his Sixth Amendment right to investigate the insanity defense in order to preserve his Fifth Amendment right against self-incrimination" by requiring him to follow the mandates of MCL 768.20a. (43a-44a). Citing *People v Dobbens*, 440 Mich 679, 699; 488 NW2d 726 (1992) (Levin, J., dissenting) and *People v Wright*, 431 Mich 282, 286-287; 430 NW2d 133 (1988), the trial court recognized:

> . . . any statements made by Defendant during the examination are admissible only on the issue of his mental illness or insanity at the time of the charged offense. MCL 768.20a(5). Compelling a defendant to undergo a psychiatric examination on the issue of his criminal responsibility does not violate the defendant's right against self-incrimination if the information obtained is used for that purpose only. [44a].

In *Toma*, *supra*, at 294, this Court specifically rejected the very same argument raised by Defendant of whether he had been forced to choose between his constitutional right to assert a substantial defense or to give up his constitutional privilege to be free from compelled self-incrimination. *Id.*, at 294, citing *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973); *People v Whitfield*, 425 Mich 116, 124, n 1; 388 NW2d 206 (1986) and *Hayes*, *supra*, at 278. Rejecting defendant's position in *Toma*, this Court wrote:

> It is well settled that the right to assert a defense of insanity may permissibly be limited by "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."

> *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). This Court has previously recognized that limitations placed on raising the insanity defense, pursuant to the procedures established in MCL 768.20a; MSA 28.1043(1), do "not unconstitutionally infringe on a defendant's right to present a defense." *People v Hayes*, 421 Mich 271, 283; 364 NW2d 635 (1984).
>
> If the established rules of procedure found in MCL 768.20a; MSA 28.1043(1) do not impermissibly limit a defendant's right to assert the insanity defense, it follows that no aspect of defendant's decision regarding: (1) providing notice of intent to raise the defense; (2) cooperating with the examiner; or (3) abandoning the insanity defense, was the product of impermissible coercion. [*Id.*, at 294.]

The above language and case law is the exact language and case law that the trial court and Judge Schuette relied upon in finding that Defendant had not been denied a fair trial in the instant case because Defendant was not required to forego an insanity defense by following the statute as set forth by the Legislature and as interpreted by this Honorable Court. [See 42a; 528a]. For the Court of Appeals majority to find that the decision of the trial court was erroneous is contrary to both the law with regard to the affirmative defense of insanity as well as this Court's interpretation of the same.[4]

After finding that MCL 768.20a did not govern Defendant's request to be evaluated by a privately retained psychologist (524a), the majority went on to find that the trial court abused its discretion by holding that fairness, accuracy and reliability dictated that the statute be followed and that Defendant be evaluated at the Forensic Center prior to being evaluated by an expert of his own choosing. (526a). Defendant did not suffer any detriment by the trial court's ruling because the statute specifically forbids the use of evidence obtained as a result of a psychological

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[4] In finding that Defendant's request for an independent examination was premature before an evaluation at the Forensic Center, the trial court wrote: "Defendant's position ignores the fundamental purpose of a criminal trial; the fair ascertainment of the truth. *People v Howe*, 200 Mich App 221; 503 NW2d 749 (1993); *People v Johnson*, 356 Mich 619; 97 NW2d 739 (1959). In any event, Defendant has the right to full access to an evaluation by a clinician of his choosing -- at the appropriate time. Defendant simply does not have that right at this juncture." (44a).

evaluation except with regard to the issue of sanity. Thus, the majority was incorrect in finding that the trial court's discretion was abused.

In the Court of Appeals, the People argued that the trial court was correct in concluding that if Defendant and his counsel found, after undergoing an evaluation at the Forensic Center and then by an evaluator of his choosing, that he did not have a viable insanity defense, then he could withdraw the written notice and not face the possibility of having the information gained used against him. The Court of Appeals majority disagreed, writing in footnote 2:

> . . . We find this suggestion unworkable. A notice of intent to pursue the insanity defense under MCL 768.20a is a party admission. MRE 801(d)(2); see also *People v McCray*, 245 Mich App 631, 635; 630 NW2d 633 (2001). Therefore, even if a defendant withdraws his or her initial written notice, the prosecution remains free to use the contents of the notice as impeachment evidence at trial. *Id.* at 636-637. [524a].

Again, the majority was legally incorrect. *McCray* dealt with the affirmative defense of alibi, not insanity. In *McCray*, the Court of Appeals found that a *notice of alibi* is an admission by a party-opponent under MRE 801(d)(2)(C) that can be used to impeach the defendant. As this Court is undoubtedly aware, an alibi defense is entirely different than an insanity defense. The defendant in *McCray* made the argument that his notice of alibi should have been excluded just as are "statements made during plea negotiations, which are not admissible under MRE 410, or to statements made by a defendant to an examining psychiatrist, which are not admissible, pursuant to MCL 768.20a(5), if the defendant later chooses not to pursue an insanity defense." *Id.*, at 636. The Court of Appeals panel disagreed with defendant McCray's argument, finding that a notice of alibi is different than a plea negotiation or an insanity defense, holding:

> . . . in both examples relied on by defendant, there exists a *policy-based* rule or statute that *prohibits admission of the statements in question, including for purposes of impeachment.* See, e.g., *People v Toma*, 462 Mich 281, 293; 613

NW2d 694 (2000)(no exception to MCL 768.20a[5] for impeachment exists). [*McCray*, *supra*, at 636. Emphasis added].

Therefore, contrary to the majority's contention that the withdrawn notice of insanity defense could be used as a party admission for impeachment purposes, *McCray* actually finds the exact opposite and says that there is a policy-based reason why the evidence of a defendant's sanity may *not* be used against him for *any* reason *except* as to the issue of his sanity. *Toma*, *supra*, at 293, citing *People v Jacobs*, 138 Mich App 273, 276-278; 360 NW2d 593 (1984).

As noted by the trial court in denying Defendant's motion for an independent examiner, a fact entirely ignored by the Court of Appeals majority, the insanity statute specifically addresses the use of evidence obtained as a result of an evaluation, whether it be by the Forensic Center, other qualified personnel or the independent examiners hired by the respective parties. MCL 768.20a(5) states unequivocally:

> Statements made by the defendant to personnel of the center for forensic psychiatry, to other qualified personnel, or to any independent examiner during an examination shall not be admissible or have probative value in court at the trial in the case on any issues other than his or her mental illness or insanity at the time of the alleged offense.

Any statement made by a defendant during any evaluation, including his own, is privileged and cannot be used during trial for any reason other than on the issue of his sanity or mental illness.

The notion that any of Defendant's statements to the forensic center examiner could be used for impeachment is contrary to this Court's prior decisions in *Toma*, *Jacobs* and their progeny. The prosecution could not use anything learned during the evaluation for any reason other than to refute a claim of insanity because this would be contrary to the mandates of MCL 768.20a(5).

Unlike in a notice of alibi, a notice of an intent to pursue an insanity defense does not require a defendant to admit to anything more than that he was not in his right mind on a particular date. He need not admit that he was present at the scene of a crime or that he was even aware of the facts of a case before he could make a claim that he "lacks substantial capacity either to appreciate the nature and quality of the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." *Carpenter*, *supra*, at 230-231, quoting MCL 768.21a(1). In addition, even if the prosecution wished to question a defendant about a withdrawn insanity defense, the statute specifically prohibits it. *Toma*, *supra*, at 293; *Jacobs*, *supra*, at 276-278. Because Defendant fully confessed to everything once the police became involved in this case, nothing more could have been gained from any statements Defendant might have made to the evaluator, therefore, he cannot demonstrate that he would have suffered any detriment whatsoever by speaking first to the forensic center evaluator rather than his own hired expert.

By requiring him to follow the procedure set forth in MCL 768.20a, the trial court did not deprive Defendant of the opportunity to pursue an insanity defense, but rather permitted him to pursue the defense as mandated by its interpretation of the statute. Defendant was not denied an ability to pursue the defense or to seek independent review, but rather was required to do so in the order as understood by the trial judge. The United States Supreme Court has found that due process requires only that a defendant be given the opportunity to be evaluated by a neutral examiner who is not beholden to the prosecution. *Ake*, *supra* at 85; *Baldi*, *supra* at 568. He was given that opportunity in this case and he specifically chose not to take it.

After finding that due process requires only an examination by a neutral mental health professional, the United States Supreme Court in *Ake* found:

> This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel, we leave to the State the decision on how to implement this right. [*Id.*, at 83.]

If the Constitution does not require that an indigent defendant be given an evaluator of his own choosing, then surely the Constitution does not require that a defendant of financial means be given any greater rights.

It appears as though counsel is acting with the benefit of hindsight based on the juror note (516a) when he argues that he should have pursued the defense of insanity. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). The defense of mitigation was a legitimate, reasoned and well prepared strategy employed by the defense. The fact that a strategy does not work does not render its use ineffective assistance. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Where there was no detriment to pursuing the defense as required by the trial court, and where counsel made the strategic decision not to pursue it, he should not now be permitted to harbor an appellate parachute. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998); *People v Roberson,* 167 Mich App 501, 517; 423 NW2d 245 (1988).

None of the facts adduced at trial reflected that Defendant was insane when he killed Leila. The fact that Defendant and Leila may have appeared happy and in love to friends and acquaintances weeks, or even days, before the murder does not demonstrate insanity. To the contrary, the fact that others saw Defendant as loving and gentle does nothing more than demonstrate that Defendant was capable of having a loving relationship. The People's theory of the case was that Leila told him that she wished to remain friends but that she had dinner the night before with an old boyfriend. The fact that Defendant went out the morning of the murder

to buy a bat, garbage bags, tape, cleaning supplies and plastic sheeting are all indicative that he had a plan and that he knew what he was doing that day. In addition, the fact that Defendant went to his friend's house to watch and cheer for the Pistons and that he repeatedly made calls and sent text messages to Leila even after he killed her also show that he had a plan in covering up his crime. Further, the fact that he went to Leila's house with his parents to look for Leila and then took the opportunity to hide the bat under the bed and to move the body to the next door neighbor's also demonstrate that he was in control of his faculties.

This Defendant was not prevented from pursuing a defense; he chose not to pursue it. A failed strategy does not constitute deficient performance. *People v Petri*, ___ Mich App ___; ___ NW2d ___ (COA no 275019. Approved for Public 6/26/08). Where the United States Supreme Court has determined that due process requires only an evaluation by a neutral examiner, not beholden to the prosecution, *Ake*, *supra*, which is what he was afforded in this case, then Defendant surely cannot demonstrate that his constitutional rights were violated.

d. Conclusion.

This Honorable Court has found that MCL 768.20a is a comprehensive legislative scheme employed when a criminal defendant is considering a defense of insanity. This Court has also found that a defendant is not forced to choose between his Fifth and Sixth Amendment rights where the legislature has specifically indicated that any statements a defendant makes during a forensic interview may not be used against him in court, even for impeachment purposes, except as to the issue of insanity. Defense counsel made a strategic decision to forego an insanity defense in favor of a mitigation defense. Where Defendant was given the opportunity to be evaluated by an examiner not beholden to the prosecution, he has failed to demonstrate that he was denied a fair trial in this case. The Court of Appeals erred in granting him relief.

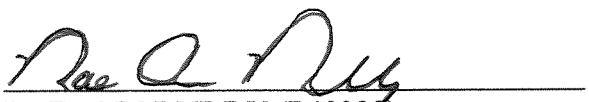
RELIEF

WHEREFORE, David G. Gorcyca, Prosecuting Attorney in and for the County of Oakland, by Rae Ann Ruddy, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court reverse the opinion of the Court of Appeals and reinstate Defendant's conviction in the Oakland County Circuit Court.

Respectfully Submitted,

DAVID G. GORCYCA
PROSECUTING ATTORNEY
OAKLAND COUNTY

JOYCE F. TODD
CHIEF, APPELLATE DIVISION

By: 

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DATED: July 18, 2008